US EPA RECORDS CENTER REGION 5
514402

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

STATE OF MINNESOTA, by its Attorney General Hubert H. Humphrey III, its Department of Health, and its Pollution Control Agency,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION; HOUSING AND REDEVELOPMENT AUTHORITY OF ST. LOUIS PARK; OAK PARK VILLAGE ASSOCIATES; RUSTIC OAKS CONDOMINIUM INC.; and PHILIP'S INVESTMENT CO.,

Defendants,

and

CITY OF ST. LOUIS PARK,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant,

and

CITY OF HOPKINS,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

Civil No. 4-80-469

REVISED MEMORANDUM IN SUPPORT OF REILLY TAR & CHEMICAL CORPORATION'S RENEWED MOTION FOR AN ORDER COMPELLING DISCOVERY

INTRODUCTION

Reilly Tar and Chemical Corporation submits this brief in support of its earlier filed Memoranda in support of Reilly's motion to compel.[1/] The submission of an additional brief is necessary to clarify the effect of Judge Magnuson's Order of August 25, 1983 granting the State's partial summary judgment motion with respect to Reilly's settlement defense, on the motion to compel. In addition, since the original briefs were filed, Reilly has taken the depositions of certain nonlawyers employed by the City of St. Louis Park ("City") and the State of Minnesota ("State"). During the depositions of Harvey McPhee, Clarence A. Johannes, Edward M. Wiik, and Dale Wikre, counsel for plaintiffs State and City interposed objections to questions asked of the witnesses based on the attorney-client and work product privileges, and instructed them not to answer. Those instructions were obeyed by the witnesses. Due to a failure to resolve this discovery dispute despite an attempt to do so pursuant to Local Rule 4(c), it has become necessary to seek an Order compelling discovery with regard to nonlawyer witnesses in addition to the lawyer witnesses.

Reilly originally moved to compel answers to the deposition questions propounded to the lawyer witnesses on June 24, 1983. In anticipation of this motion, and with the objective of forestalling Reilly's motion to compel, the State made a motion for partial summary

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1/ For the convenience of the Court, Reilly has incorporated in this Memorandum the arguments set forth in its prior briefs concerning this motion to compel.

judgment with respect to Reilly's settlement defense. Judge Magnuson first decided that he would hear both motions. Then, at the July 29, 1983 hearing, he decided to rule first on the motion for summary judgment, and to remand the motion to compel back to the Magistrate. By agreement between the parties, the motion to compel was not scheduled for hearing, pending a final decision by the Court on the motion for summary judgment.

On August 25, 1983, Judge Magnuson granted the State's partial summary judgment motion. Reilly filed a motion for reconsideration or certification for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The Court denied the motion for reconsideration or certification. Thereafter, Reilly filed with the Court of Appeals a Petition for Writ of Mandamus. Mandamus was denied by the Court of Appeals on January 24, 1984. It is with this background that this brief is submitted in support of Reilly's motion to compel.

Pursuant to Federal Rule of Civil Procedure 30, defendant Reilly properly noticed and commenced several depositions in this case. Specifically, Reilly deposed attorneys Robert J. Lindall and John B. Van de North, Jr. on August 25 and 26, 1982, respectively. On April 21, 1983, Reilly deposed Gary Macomber and Rolfe Worden, and on April 26, 1983, Reilly deposed Wayne G. Popham. These witnesses represented the City of St. Louis Park. In these depositions, Reilly sought to determine the background of and the circumstances surrounding the purchase by the City of the property formerly occupied by the Reilly plant. Reilly also sought to obtain evidence concerning the intended result of a dismissal

of litigation commenced by the Minnesota Pollution Control Agency ("PCA") and the City in the year 1970.

Several times throughout these depositions, counsel for the State and City and counsel representing the deponents objected to the questions asked, instructed the particular witness not to answer, and the witnesses obeyed the instructions.

These objections were ostensibly founded on the attorney-client relationships which existed when Messrs. Lindall and Van de North were employed in the State Attorney General's office (positions which both of them have since left) and when Messrs. Macomber, Worden and Popham represented the City. While the last three attorneys still represent the City, the questions in the depositions inquired only about events which took place in the late 1960's and early 1970's, long before the present federal action was initiated.

The early paragraphs of the City's memorandum in opposition to Reilly's motion accuse Reilly of "gamesmanship". Its reference to the fact that the Popham law office made a determination that the testimony of its members would be consistent with the position of its client, and that it was therefore proper for that law office to represent the City in this case, indicates to us that the Popham office has incorrectly perceived Reilly's motive for deposing members of the Popham law firm. Reilly's motive is simply to obtain relevant testimony. It has no interest in disqualifying the City's counsel.

Rule 3.7 of the ABA's Model Rules of Professional Conduct, adopted by the House of Delegates of the ABA on August 2, 1983, makes

substantial changes in the rules relating to the lawyer as a witness.[2/] Under the new rule, the prohibition is against acting as an advocate in a trial where the advocate is likely to be a necessary witness. The lawyer-witness' entire law firm is no longer disqualified, as it would have been under the 1969 Code.[3/] Thus, it would be proper for Messrs. Popham, Worden and Macomber to testify and another trial lawyer from the Popham firm to try the case. Since many of the trial proceedings and depositions to date have been handled by Allen Hinderaker, no hardship would be imposed upon the Popham firm or on the City by such a division of responsibility.

This change in the Code makes it highly likely, we suggest, that Popham, Worden and Macomber will be trial witnesses. They were intimately involved in the settlement in 1972 and the making of the hold harmless agreement in 1973. It seems obvious that we should have the opportunity to explore their testimony in advance of trial, through depositions.

On November 1, 1983, Reilly also deposed Dale Wikre, the Director of Solid and Hazardous Waste Division of the PCA. Mr. Wikre was formerly employed by the PCA as a geologist in the Special Services

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2/ New rule 3.7(a) reads: "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness . . .."

3/ The comment to the new rule reads in part: "The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem." The committee notes also read in part: "Second, the general rule stated in paragraph (a) has no imputed effect so as to disqualify an advocate whose associate appears as a witness. The interests protected by the rule are not endangered where one lawyer appears as a witness and another as advocate."

Section of the Division of Water Quality. In the mid-1970's he was also the head of the Land Application Unit of the Division of Water Quality. In this deposition, Reilly sought to determine the scope of the 1970 state court lawsuit against Reilly Tar, Mr. Wikre's understanding of the hold harmless agreement, and its effect on the state court litigation, and evidence concerning agreements of the State with United States Geological Service ("USGS") and Professor Pfannkuch at the University of Minnesota for research work relating to the contamination in St. Louis Park. During this deposition, counsel for the State objected to the questions asked based on the grounds of attorney-client privilege and attorney work product. Mr. Wikre was instructed by counsel for the State not to answer the questions and Mr. Wikre obeyed the instructions.

In September of 1983, Reilly deposed Edward M. Wiik and Clarence A. Johannes. Mr. Wiik was the former Director of the Air Quality Division of the Pollution Control Agency. Mr. Johannes was the former Director of the Water Quality Division of the PCA and also served as the Chief Water Pollution Control Engineer for the Agency. Both of these witnesses were questioned on the scope of the 1970 state court lawsuit, and were instructed by counsel not to answer the questions on the basis of the attorney-client privilege.

Similarly, Mr. McPhee, the Director of Inspections for the City and the former Director of Public Health for the City of St. Louis Park was questioned during his deposition on documents and a meeting which related to the scope of the 1970 lawsuit and he was instructed not to answer the questions on the basis of work product and attorney-client

privilege and Mr. McPhee obeyed the instructions. In renewing the motion to compel, Reilly requests that these non-lawyer deponents also be compelled to answer deposition questions.

BACKGROUND FACTS

The instant federal case arose in September, 1980, when the United States of America filed suit against Reilly and others under the provisions of the Resource Conservation and Recovery Act of 1976 ("RCRA"). After the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") was passed, the United States amended its complaint to allege claims under that act as well. At various times, the State, the City of St. Louis Park, and the City of Hopkins were granted leave to intervene as parties plaintiff, and each filed separate complaints, asserting claims under both RCRA and CERCLA as well as various state law claims.

All of the claims relate to alleged contamination of the soil and groundwater in and around the site in St. Louis Park of a coal tar refinery and wood treatment plant operated by Reilly from 1917 until its closing in 1972. This alleged contamination was also the subject of a suit filed in 1970 by the State and the City against Reilly in state court. State of Minnesota, et al. v. Reilly Tar & Chemical Corp., Minn. Fourth Jud. Dist., File No. 670767.

Reilly has contended that the claims in intervention of both the State and St. Louis Park were compromised and fully settled in 1972-73 when the first state court lawsuit was resolved. That resolution

involved purchase of the Reilly plant site by the City, pursuant to the terms of a Purchase Agreement; formal dismissal of the lawsuit by the City; delivery of a hold harmless agreement from the City to Reilly; and an implicit acceptance of and acquiescence in the settlement of the lawsuit by the State through both its actions and inactions. Although the Court has rejected Reilly's settlement defense with respect to the State, Reilly's affirmative defense of settlement with the City by way of the formal dismissal of the lawsuit is still before the Court.

Reilly's position that the claims raised by the State and City complaints in intervention were settled in 1972-73 is set forth in detail in its Petition for Writ of Mandamus. In order to avoid needless repetition, we will not set forth in this Memorandum the chronology of events relevant to the scope of the state court action and the settlement which is contained in Reilly's other memoranda. That chronology is instead incorporated herein by reference.[4/]

The chronology, based almost entirely upon documents produced by the State and the City, establishes, in substance, that a dispute concerning alleged groundwater pollution existed between Reilly, on the one hand, and the City and the State, on the other, for many decades. That dispute came to a head in 1970 when the City and the State sued

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4/ A copy of the Petition for Writ of Mandamus containing the chronology of events is provided along with this Memorandum as Appendix 1 to the Affidavit of Edward J. Schwartzbauer dated April 20, 1984, in support of this motion (hereinafter A-__) for ease of reference. The Court is urged to review pages 13 through 35 thereof. Reilly has not provided the Court with the lengthy appendix to the petition. If the Court would like to review any of the documents referred to in the petition, Reilly will provide them upon request.

Reilly for alleged air and water pollution. In 1971, the action was stricken from the calendar in Hennepin County District Court for settlement with the understanding that it could be reinstated if the parties failed to reach a settlement. Virtually all of the settlement discussions were between Thomas E. Reiersgord for Reilly, and Wayne G. Popham, Gary Macomber and Rolfe Worden for the City. Robert J. Lindall, who represented the State in that action, most often communicated directly with Macomber, Worden and Popham.

Reilly contends that a settlement was reached, and the case was never reinstated. The settlement was the purchase by the City of the Reilly land "as is", with the explicit agreement that the City would henceforth be responsible to remedy all claims of air and water pollution. The State was aware and kept abreast of the negotiations and settlement between the City and Reilly for the sale of the site and termination of the suit, and gave its blessing to a solution based on the sale to the City. The State was expected by all parties to deliver to Reilly a formal dismissal at the final payment for the site. However, the State did not do so because it told the City it would not dismiss the suit until the City came up with a remedial cleanup plan satisfactory to the Pollution Control Agency ("PCA").[5/] Following the City's execution

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5/ The City and State contend that the 1970 suit concerned air and surface water pollution resulting from Reilly's plant effluent. However, their arguments on this point do not hold water. If they regarded the issues in this suit as mooted by the closing of the plant, the State would have had no reason not to dismiss the suit completely. Instead, it sought from the City a plan for cleanup of the contamination after Reilly was gone and the plant demolished.

of its hold harmless agreement to Reilly, the State for years looked only to the City as the responsible party, including a period of years after the alleged first discovery of alleged carcinogenic contamination.

Both sides in the instant case have formally placed in issue the meaning of the settlement and the hold harmless agreement. The City, alleging that the agreement was never intended either by the City or by the State (with whom the City agrees it consulted) to cover groundwater contamination, has sought a declaratory judgment from this Court so construing the agreement. See Amended Complaint in Intervention of the City of St. Louis Park, ¶¶ 14-20, 34-37, and Prayer for Judgment ¶ 3. Reilly has pled that the settlement and the hold harmless agreement serve as affirmative defenses to the complaints now asserted against it in the instant suit. See the Reilly Answers to the various Amended Complaints of the United States, the State, the City of St. Louis Park and the City of Hopkins.

Moreover, in its cross-claim against the State, the City has itself put in issue the questions of what communications, representations, and understandings existed between it and the State with respect to the Purchase Agreement, the hold harmless agreement, and the settlement of the lawsuit. See Reply and Cross-Claim of the City of St. Louis Park dated May 18, 1983, ¶¶ 21-24.

In this kind of a case, it is obviously necessary to question the witnesses who negotiated the arrangements as to their understanding of what was to be done, their understanding of the meaning of certain language, etc. To object to those questions on the ground of "work

product" is disingenuous and prevents Reilly from exploring through discovery what is arguably the major issue in this case.

In order to determine what was settled explicitly by the City when the 1970 lawsuit was resolved, the scope of that lawsuit must be ascertained. To do so, it is of critical importance to examine the architects of the lawsuit to determine what they knew of possible groundwater contamination at the time and why they chose to cast the allegations of the suit in such broad terms covering alleged contamination of "waters of the state" (see 1970 Complaint ¶¶ I, VII-X, XII (including "WHEREFORE" clause); RTC Ex. 8, A-2, rather than confining it solely to alleged contamination of surface water. Because the State and the City began in 1978 to contend that the original, settled suit did not cover groundwater, it is of critical importance that Reilly be allowed to inquire of the draftsmen of the suit concerning its actual, legal scope. Reilly has tried to do this on several occasions but inquiry has always been blocked by the State's and the City's assertion of attorney-client privilege and the work product doctrine, compelling Reilly to bring this motion.

For example, the lawyer deponents themselves established that Lindall, Popham and Macomber were the three persons who prepared the original 1970 Complaint. See Dep. of Lindall at 42:5-24; Dep. of Popham at 21:24-22:26; Dep. of Macomber at 9:14-21. Lindall is presently in private practice in Minneapolis and is not representing any party to this action. Neither he nor the other witnesses, however, were permitted to answer concerning what they understood by the term "waters of the state",

a key part of the scope of the 1970 Complaint. See Dep. of Lindall at 42:25-44:15; Dep. of Macomber at 10:5-15; Dep. of Popham at 22:17-19. Inquiry was similarly blocked concerning several other matters relating to the background and scope of the 1970 lawsuit, as is evidence by the citations to questions and objections compiled in Appendix A.

The City in its Memorandum in Opposition to Reilly's Motion to Compel has, by several references to the deposition of Mr. Herb Finch, former manager of Reilly's St. Louis Park plant, attempted to create the impression that neither the City nor the State were concerned with groundwater pollution. But the cited passages do not prove that conclusion, and, indeed, Mr. Finch explicitly testified that:

> The city was highly concerned about what was going on, contamination of ground water, the State was concerned about the contamination, had been since 1932 or '33.

(Dep. of Finch at 626).

The version of the "facts" referred to by the City and the State in their briefs in opposition similarly requires careful review. For example, the City asserts that "[p]henols were not, however, considered harmful to health," (Br. of City at 10), that the City had an "understanding of the limited negative consequences of phenolic contamination," (id.), and that "[i]t was understood that any theoretical future claim of groundwater pollution by the State would be limited to phenolic contamination, contamination that was not harmful to health." (Id. at 13). Yet the City's own attorney, Wayne Popham, in his memorandum to the State's attorney at the time, Eldon Kaul, summarizes the same PCA and Department of Health reports which reported only minimal

phenolic contamination of City wells as stating that "the discharge at the site was a potential source of percolation through the soil and could be a hazard to the municipal wells as a source of water supply," that "consideration should be given to removing the contaminated ground," and that "disposal of phenolic material in substantial quantities on the surface of the ground constituted a serious hazard." (RTC Ex. 85, p. 2, A-3). Whether or not this is a conclusive refutation of the City's conclusory statements, it shows that the record is far from as clear as the City and State would have this Court believe, and that discovery should and must continue both to find out what was known, what was understood, what risks were assumed or consciously disregarded, and who knew what when.6/

Another critical issue into which inquiry has been blocked concerns the intended scope of the hold harmless agreement issued to Reilly by the City. See RTC Ex. 71, A-4. Although the City now denies that the hold harmless agreement means what it says, the City and the

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6/ The City has similarly mischaracterized the reports concerning the so-called Republic Deep Well. (See Br. of City at 13). At most, the exhibits reflect that Reilly occasionally experienced some tarry materials in well water; it did not know how or where they came from, but it assumed they came from materials entering the well relatively near the surface. (See, e.g., Ex. 19 to the Aff. of Kathleen M. Martin submitted in support of the City's brief in opposition). This is not inconsistent with the knowledge the City itself had, concerning soil "contamination" with tarry materials which might percolate and become a hazard to wells. (See, e.g., RTC Ex. 85, A-3).

The City has also mischaracterized the position of experts who have studied the Deep Well. Neither Reilly nor any expert it has employed in any way admit that there is any carcinogenic contamination involved in this matter.

State have prevented Reilly from questioning the very people who constructed the agreement to ascertain their knowledge and intentions at the time.

For example, despite the production of a letter memorializing a meeting on June 15, 1973, between Jack Van de North, representing the State, and Rolfe Worden, representing the City (RTC Ex. 34, A-5), neither Van de North, nor Worden -- who shortly thereafter prepared the hold harmless agreement (Dep. of Worden at 46:10-19) -- were allowed to testify concerning the substance of the meeting. See Dep. of Worden at 18:19-26:3; Dep. of Van de North at 14:6-21:9. Other inquiries aimed at information to help construe the hold harmless agreement met similar fates, as referenced by the citations in Appendix B. This refusal to permit necessary inquiry is all the more egregious in light of the City's attempt to have this Court put its blessing on the City's conveniently narrow ex post facto view of the agreement via its request for a declaratory judgment.

The meaning of certain provisions in the Purchase Agreement, an integral part of the settlement of the 1970 suit, is also a relevant and critical issue in the case. The Purchase Agreement, for instance, recites that the City agreed to buy the Reilly site "as is" insofar as any possible contamination was concerned. See RTC Ex. 31, ¶ 4, A-6. Once again, it is necessary to ascertain from the draftsmen and negotiators involved the meaning of that phrase, including their knowledge of possible groundwater contamination and how it came to be that such sweeping, all-inclusive language was included in the Purchase

Agreement. Once again, Reilly has been blocked in its attempts to discover the information from the persons involved as evidenced by the citations to depositions in Appendix C.

Another area of inquiry which has been denied Reilly by the dubious assertions of privilege and work product by the State and the City concerns the acquiescence by the State in the settlement of the suit and the substitution of the City for Reilly. Here, because Reilly is alleging an implicit settlement of the suit by the State, it is perhaps of even more critical importance that the knowledge, understandings and intentions of the participants be thoroughly probed. As recited above, although discovery is not yet complete, there is substantial evidence as shown through the exhibits used in the depositions in question here (1) that the State was privy to the settlement negotiations, (2) that the State accepted the City's resolution of the matter, and (3) that the State thenceforth looked to the City, and not Reilly, as the party responsible for the site and any remedial action that the State would require. See Reilly Petition for Writ of Mandamus, pp. 18-35, A-1. When confronted with these documents (now in the hands of Reilly), the State and the City have refused to let Reilly ask the authors or recipients of those documents about them, and have refused to let Reilly inquire of the principal actors what their knowledge was, or what their understandings and intentions were.

The plaintiffs will undoubtedly now argue that Judge Magnuson's ruling against Reilly on the issue of the implied settlement of the lawsuit by the State precludes any further discovery on that issue.

Judge Magnuson's ruling against Reilly on the implied settlement defense is an interlocutory order which he may reconsider. However, if Reilly is precluded from initiating additional discovery on the implied settlement defense, it will be placed in a "catch 22" situation. Reilly will be unable to avoid the law of the case on this issue because it will be unable to discover new facts to show that the ruling was erroneous. Also to the extent that discovery is allowed on this issue at the present time, there will be less of a need for extensive discovery on the implied settlement defense after appeal. Reilly further contends that the deposition questions which relate to the issue of settlement of the lawsuit on the part of the State are still very relevant in the context of the meaning and scope of the explicit settlement with the City.7/

A few examples here highlight the problem faced by Reilly. In one instance, although Lindall was permitted by the State to testify that

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7/ An examination of the questions found in Appendix D which relate to settlement indicates that these questions not only relate to the issue of settlement with the State but also clearly relate to the settlement that was entered with the City and to the topics found in the other Appendices. Many of the questions cited in Appendix D also relate to the scope of the 1970 lawsuit. See Dep. of Lindall at 71:4-72:2, 72:8-72:14, 72:16-72:23, 72:25-73:7, 74:9-74:22, 74:23-75:5, 87:2-90:1, 109:17-110:13, 114:8-114:14, 117:6-117:15, 146:21-147:1, 147:3-147:9; Dep of Van de North at 38:18-38:23; Dep. of Popham at 9:4-9:5, 9:7-9:8, 37:20-38:13, 71:14-71:21, 71:23-71:25, 73:17-74:8, 77:14-77:18, 84:13-84:16, 99:23-99:25. Similarly many of the questions listed in Appendix D also relate to the Purchase Agreement between the City and Reilly (see Dep. of Lindall at 71:4-72:2, 73:18-74:7, 78:9-78:16, 78:18-78:23, 78:25-79:12, 80:24-81:4, 81:6-81:10, 81:12-81:23, 83:24-84:4, 84:6-84:10, 87:2-90:1, 132:3-132:8, 140:24-141:7, 141:10-141:16; Dep. of Van de North at 18:25-19:4, 19:6-9:12; Dep. of Worden at 15:4-15:6, 16:19-16:24, 20:17-21:17, 21:19-21:23; as well as the hold harmless agreement. See Dep. of Popham at 9:4-9:5, 9:7-9:8, 104:7-104:8.

certain minutes of a Minnesota Pollution Control Agency meeting (see RTC Ex. 18, A-7), at which he reported on settlement negotiations between Reilly and the City, were inaccurate, he was not permitted by the State to explain in what respect he thought they were inaccurate. See Dep. of Lindall at 87:2-90:1. At another point, although a chronology prepared by the City (and produced to Reilly) summarized a conversation in 1971 between the City Attorney for the City and Lindall as the attorney for the State concerning clean up of the site by the City once Reilly left (see RTC Ex. 21, A-8), Mr. Lindall was instructed not to testify concerning that conversation or similar ones on the same topic. Dep. of Lindall at 107:14-108:25. And, despite documentation produced to Reilly reflecting conversations between Gary Macomber, another attorney for the City, and Lindall, counsel for the State, concerning purchase by the City of the Reilly site (see, e.g., RTC Ex. 14, A-9). Macomber was not allowed to testify to those matters:

Q As I indicated, the letter [RTC Ex. 14] says that you learned that the appraiser's report is due this week. What were you referring to there?

MR. POPHAM: I would object to that as calling for work product and attorney-client privilege.

BY MR. SCHWARTZBAUER:

Q Gary, what was the relevance of the appraiser's report to your conversation with Lindall?

MR. POPHAM: Same objection.

BY MR. SCHWARTZBAUER:

Q Reading on in the letter it says 'As soon as that is in Chris intends to recontact the Reilly Tar people and determine their reaction to that appraisal price. That meeting should occur during the week of July 19.

After that is accomplished we will be in a position to make a decision as to the certificate of readiness.' How would that meeting help in making a decision with respect to the certificate of readiness?

BY POPHAM: Same objection.

BY MR. SCHWARTZBAUER:

Q At about that time did you tell Lindall that the sale that was being negotiated between Saint Louis Park and Reilly was a proposed means of settling the lawsuit?

MR. POPHAM: Same objection.

Dep. of Macomber at 13:8-14:10. These examples are but the tip of the iceberg, as the list of citations to questions objected to in Appendix D shows.

Denial of discovery is not limited to questions posed to lawyer witnesses. An illustration is found in the deposition of Dale Wikre, a state witness. Mr. Wikre was questioned on notes of a meeting (RTC Ex. 111, A-10) between PCA officials and the City of St. Louis Park on October 7, 1977. These notes were produced by the City during the course of discovery. The questioning during the deposition proceeded as follows:

MR. SCHWARTZBAUER:

Q I am going to read various parts of this to you and ask you about it. Continuing where I left off just a minute ago this memo says, "Popham feels that it may be difficult to include Reilly Tar & Chemical back into this subject." Did Mr. Popham say that in a meeting you attended?

MR. SHAKMAN: I would object and instruct the witness not to answer. I would note for purposes of the record, the document is dated October 7, 1977 and at that time the State and the City shared a common interest in pursuing the matter of the liability of the Reilly Tar & Chemical Company for the subject contamination, and accordingly communications between Mr. Popham and Mr. Donahue, attorney for the

Pollution Control Agency, and their respective clients would in our opinion be privileged.

Dep. of Wikre at 135:23-136:13.

Many of the questions which the deponents refused to answer related to communications between the lawyers for the PCA and the lawyers for the City. In their briefs in opposition, the State and City tell us that the basis for this refusal is the claim that the PCA and the City were engaged in a common enterprise. While it could be possible to see the basis of this claim if one were seeking to disclose confidential communications between the PCA and City lawyers in 1970, when the lawsuit was commenced and active, that theory cannot apply to the settlement of the case, and certainly cannot apply to negotiations between the PCA and the City in subsequent years, after the City's lawsuit was dismissed, and the City had agreed to hold Reilly harmless for anything the State might require.

Statements which make up the several steps involved in implementing a settlement are no more confidential than the statements which together make up any contract. By their nature, they are intended to be communicated to the other parties to the litigation. If Macomber told Lindall in 1973 that Reilly and the City were negotiating for a purchase, that communication would obviously not be privileged, because it was not intended to be kept secret.

Moreover, as of April 14, 1972, the City had agreed with Reilly to take over the property "as is" and had assumed at least some degree of cleanup responsibility. Since the PCA is the state agency responsible for the environment, it is obvious that from at least that date on they no longer shared the same interests in the litigation.

Finally, the communications that occurred in years subsequent to the dismissal of the case by the City in 1973 were no longer part of a joint prosecution of a lawsuit. Both the City and the State concede that the conversation between Worden and Kaul in 1974 was not privileged because the City had settled its case in 1973. If that is true, what event signalled the re-creation of the common enterprise? They claim that communications from 1974 (after the discovery of benzo[a]pyrene in the soil) to 1978 are privileged because the City and the State would both be interested in protecting the public health. We suggest that that is just wishful thinking. The record clearly shows the adversity between the City and the PCA.

We refer the Court to the exhibits dealing with the negotiations between the PCA and the City from 1974 to 1978, especially RTC Exs. 92, 93, 98, 103 and 110, A-11, 12, 13, 14, 15. Ex. 92, a draft stipulation prepared in 1974 by the PCA, recites that "the Agency alleges that the City is presently violating applicable Minnesota laws relating to water pollution . . .." Does that sound like a common enterprise, or does it sound as though the PCA and the City are now dealing with one another as adversaries?

RTC Ex. 93, a St. Paul Dispatch article, indicates that Dale Wikre, a PCA groundwater specialist, says this "could be one of the largest groundwater contamination problems the State has ever had." The same article tells us that "St. Louis Park City Manager Chris Cherches disagrees." "As far as I'm concerned," Cherches said, "there is no problem. If there was a health problem, it would have been handled by the City long ago . . .." A common enterprise?

Another article in the Dispatch published a few days later reports a St. Louis Park news release. The headline of the article is "Suburb attacks PCA statement calling land 'contaminated'." The article, referring to the news release, states "St. Louis Park has indicated it might take the PCA to court in an effort to force issuance of the storm sewer permit." See St. Paul Dispatch article, dated October 28, 1974, A-16. Is there a common enterprise when one party is publicly threatening to take the other into court?

At the December 17, 1974 PCA Board meeting, the Board resolved that "the agency staff enter into negotiations with St. Louis Park to write up a . . . stipulation agreement that will deal with [the contaminants in the groundwater]." RTC Ex. 98, A-13.

In another draft stipulation prepared by the PCA in 1975 the agency alleges once again the the City is in noncompliance with Agency regulations. RTC Ex. 103, A-14. That same stipulation calls for St. Louis Park to monitor benzo[a]pyrene and chrysene, the alleged carcinogens.

In RTC Ex. 110, A-15, a stipulation agreement signed by the PCA and the City April 19, 1977, the City agrees to various matters and the Agency to others. Among other things, the City agrees not to pass on to future purchasers of the land any responsibility for the costs of future reclamation. This was done in return for the Agency's agreement that the northern portion of the site could be developed. The document on its face is one drafted and entered into by two parties with opposing interests -- one which wants to develop the property and the other which

wants to control development. See also Ex. I to the Reiersgord affidavit of June 23, 1983, on file herein, in which Sandra Gardebring, executive director of the PCA, states that the PCA must have a responsible party, and that the City is it.

In this case, given the concession that the joint prosecution of the lawsuit ended when the City dismissed its case in 1973, there is absolutely nothing to support the argument of the City and the State that their communications with one another between 1974 and 1978 were privileged.

Leaving aside for the moment that five of the deponents happen to be lawyers, there is no question that Reilly should be permitted to inquire of these five deponents concerning matters within their personal knowledge and understanding at the time of the events in question. They themselves are "first-hand" witnesses to the events. Moreover, they are the only witnesses to such matters as their own knowledge and intentions at the time of drafting documents and during various negotiations among the parties. They, as actual participants, are witnesses on the crucial issues discussed above and presumably will testify concerning them at trial. Indeed, on more than one occasion some of them have already testified on these matters. Both in 1978 in the state court suit and again in the spring of 1983 in this Court, Mr. Lindall offered via affidavits his own sworn testimony to the court on the issue of settlement of the 1970 lawsuit. See Lindall affidavit, June 21, 1978, Exhibit E to Reiersgord affidavit of June 23, 1983; and Lindall affidavit, April 20, 1983, on file herein. In his 1978 affidavit,

Lindall explicitly stated that his testimony was made after he had reviewed the files and documents on the matter, including attorney notes. He thus testified both as to his own recollection, presumably refreshed by those documents, and as to his interpretation of those documents. This testimony has now twice been offered to the Court on behalf of the State's position that there has been no settlement, but the State has in effect refused Reilly the chance to cross-examine Mr. Lindall concerning the settlement or the documents involved. Furthermore, a similar affidavit of Van de North has also been offered by the State. See Affidavit of John B. Van de North, Jr., April 14, 1983, on file herein. The State would thus have this Court accept the conclusory testimony of its former attorneys but at the same time not permit Reilly to inquire as to the basis of that testimony. Such blatantly unfair tactics on the part of the State, coupled with its rush to have the Court decide its motion for summary judgment on the settlement question before discovery on the issue had even been completed, suggests that the State may have something to hide that it does not want discovery to bring out.

The final area of inquiry in which Reilly has been denied discovery concerns the retention of the USGS by the State to prepare a model of the groundwater flow conditions in St. Louis Park. The State contends that the USGS was retained for purposes of litigation. However, as the deposition of Mr. Wikre indicates, Reilly has been precluded from determining whether the contracts with the USGS were entered into by counsel for the State, or by some non-legal person in the PCA staff. Mr.

Wikre was asked whether any of the USGS contracts were entered into at the initiative of the Attorney General's staff, and counsel for the State refused to let Mr. Wikre answer based upon the work product privilege. See Dep. of Wikre at 185:13-187:1.

The USGS did extensive groundwater modeling studies in St. Louis Park. Reilly does not believe that the USGS work is work product materials. By denying Reilly the opportunity to determine whether the USGS was retained at the initiative of counsel for the State, Reilly has been precluded from determining whether there is a valid claim for asserting work product privilege.

To prevent the discovery of these nine witnesses by Reilly, the State and the City have waived the red flag of lawyer status of five of the witnesses and have prevented inquiry by asserting both attorney-client privilege and the work product doctrine while instructing the witnesses not to answer. But as will be demonstrated, this red flag is nothing more than a red herring; no attorney-client privilege or work product doctrine applies to protect from discovery the information sought of these deponents by Reilly; and, to the extent any such protection was ever arguably afforded, it has long since been waived by both the State and the City.

Depositions of Non-Lawyers are not a Prerequisite to Lawyer Depositions

The State and the City both complain because, at the time they submitted their memoranda, Reilly had not yet taken the depositions of certain non-lawyers employed by the City and the State. The relevance of

that acknowledged fact is nowhere explained, but the implication is that we should take those depositions first. Why? If we took those depositions first, would the plaintiffs then withdraw their objections to the questions asked of the five lawyers? Obviously not.[8/] It appears clear that whatever we would learn from these other witnesses, we would still want the testimony of all witnesses who were closely involved in negotiating and implementing the settlement--including the lawyers.[9/]

This is so because this case necessarily involves the proof of several points by circumstantial, rather than direct, evidence. No City or State witness can be expected to say that the release of Reilly was intended to cover groundwater, as well as surface water claims. The pleadings and the briefs demonstrate clearly that the City and State positions at this time are contrary to those ideas. Therefore, the sheer quantity of the circumstantial evidence will be important, even if it is duplicative.

Since the initial motion to compel was filed.Reilly has deposed a number of the non-lawyer witnesses and has attempted to determine the scope of the 1970 lawsuit from these witnesses. Mr. Badalich, the Director of the PCA at the time the lawsuit was filed testified that he

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8/ See, e.g., letter from Dennis Coyne to Edward Schwartzbauer dated December 21, 1982, p. 2 attached to the affidavit of Dennis Coyne (dated July 21, 1983) A-17: "Therefore, we will continue to assert the privilege, notwithstanding the fact that you may have deposed other State personnel."

9/ It is not crucial that we show that the lawyers were the only, or even the principal negotiators; there were undoubtedly others. That they were negotiators and implementors is beyond serious doubt. (See Affidavit of Thomas E. Reiersgord dated July 26, 1983, A-18).

had no specific recall of his discussions with the Attorney General's staff on the initiation of the 1970 lawsuit, that it was the responsibility of the attorney to draft the complaint, and that he had no recollection of reviewing the complaint before it was filed. See Dep. of Badalich at 96-101, A-19. Similarly, Mr. Johannes the Director of the Water Quality Division of the PCA testified that the attorneys for the Agency drafted the complaint and that it was his belief that review of the complaint before it was filed was left to the lawyers. See Dep. of Johannes at 138-45, A-20. Deposing the non-lawyer witnesses has failed to provide any meaningful insight into the scope of the 1970 lawsuit.

With respect to the scope of the settlement, including the "hold harmless" agreement, it may be that some City witnesses will admit that they had a concern for possible groundwater contamination at the time of the settlement. Even if we have such an admission, however, we would want also to show that the City attorney, and other City officials, were likewise aware of the possibility of groundwater contamination. These plaintiffs are governmental bodies which have already begun to claim that they are not subject to the doctrines of estoppel or waiver, and have already begun to allege that only their governing body has the authority to enter into contracts. We expect that we will want to point out to the jury, not only that the City manager, or the Mayor, but also the health officer, his assistant, the City clerk and the City attorney also knew of the possibility of groundwater contamination.[10/] In order to prove the

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10/ On October 4, 1983, Reilly took the deposition of Harvey McPhee, the City Health Officer for St. Louis Park. Mr. McPhee's testimony

existence and meaning of a contract through circumstantial evidence, we are entitled, we believe, to take the depositions of every witness who

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10/ (Footnote Continued)

demonstrates that he was aware of the possibility of groundwater contamination as expressed in the following excerpt:

BY MR. SCHWARTZBAUER:

Q Well, a few minutes ago I asked you a question and I would like to get back to your answer. I asked you which agencies had raised the question of contamination of ground water and I think you started to answer and did answer, "Well, there had always been a question of groundwater from the time we started the investigation." What time are you referring to there?

A Well, when we had our own questions about the groundwater when we started back in '68 and '69, questions of groundwater contamination.

Dep. of McPhee at 185:4-185:13, A-21. During the November 9, 1983 deposition of Chris E. Cherches, the former City Manager, testified that he was aware of the possibility of groundwater contamination.

Q Once again you were concerned about this seepage into the ground and possible contamination of the groundwater?

A That was always paramount in our mind at this period of time [June 1970].

Dep. of C. Cherches at 138-39, A-22.

In addition, on November 29, 1983 former St. Louis Park Mayor Frank J. Howard testified during his deposition that there was a continuing concern about groundwater contamination.

Q In October 1969, did the City continue to have concern with groundwater contamination of phenols?

A I can't say when they stopped, if they ever stopped, having concern about it. I think it was a continuing thing. They were concerned about the ground and the surface waters, and they were concerned about the air pollution until that stopped, but they were continually concerned about it.

Dep. of Howard at 93:14-93:21, A-23.

might shed some light on the existence of that contract, not just some of them.

Thus, irrespective of whether we take the depositions of non-lawyers, and irrespective of their testimony, we will still want the lawyer depositions, even if they are duplicative. Of course, with respect to some events, such as the striking of the case from the calendar, and circumstances surrounding the hold harmless agreement, the lawyers are likely to be the most valuable witnesses, if not indeed the only ones.[11/] It is important to recall that in 1978 and again in 1983, the State turned to its lawyers for affidavits that the case was not settled. Accordingly, it makes no sense to argue that we must take non-lawyer depositions first.

The plaintiffs may be suggesting that we cannot demonstrate "good cause" to obtain the lawyers' understanding of the terms of these contracts without trying first to obtain someone else's understanding. However, as this brief subsequently shows, the lawyers' understanding of the terms of these contracts is simply not "work product" or "trial preparation materials" as those terms are used in the cases or in the Federal Rules. Moreover, if "good cause" were required, it should be sufficient to show that the understandings and expectations of the lawyers who drafted or implemented these agreements are relevant and

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11/ See, e.g., RTC Ex. 87 (A-24), p. 4 (January 14, 1980 letter from W. Popham to E. J. Schwartzbauer which identifies persons from the City and State who were involved in the discussions between them on the PCA dismissal for the City, "at least in part", Rolfe Worden and, for the State, Eldon Kaul and John Van de North, all of them lawyers).

important. We cannot get at those understandings and expectations by questioning someone else.

ARGUMENT

Testimonial exclusionary rules and privileges contravene the fundamental principle that there is a right to every man's evidence. Trammel v. United States, 445 U.S. 40, 50 (1980). Because such privileges operate as barriers to disclosure and tend to suppress relevant facts, they must be strictly construed. Id.; Kahl v. Minnesota Wood Specialty, Inc., 277 N.W.2d 395, 399 (Minn. 1979).

In the instant situation, answers to the questions propounded by Reilly to the witnesses are not barred by either the attorney-client privilege or the work product doctrine. Most of the questions do not seek information communicated to the attorney by his client; accordingly, there is no basis for asserting the attorney-client privilege. Moreover, any privilege which might once have existed as to certain communications or documents has been waived by the actions of the plaintiffs herein. To the extent that any of the information inquired into by Reilly in these depositions has the attributes of work product, that information is discoverable under Fed. R. Civ. P. 26(b)(3) because Reilly has a substantial need for the information and cannot get the information through other means. Furthermore, any protection which the work product doctrine might once have afforded certain documents or communications has been waived by the actions of the plaintiffs herein.

A. Judge Magnuson's Interim Ruling of Summary Judgment is Not a Bar to Discovery.

On August 25, 1983, the District Court, in a Memorandum Order, granted the State's motion for summary judgment on Reilly's Second Affirmative Defense. This defense asserts in substance that the issues raised by the State's complaint in intervention are barred as a result of the settlement of the state court lawsuit involving the State, the City and Reilly. That settlement was the purchase of the Reilly plant site by the City; formal dismissal of the lawsuit by the City; delivery of a hold harmless agreement from the City to Reilly; and an implicit acceptance and acquiescence of the settlement of the lawsuit by the State through its actions and inactions.

A number of the questions posed to the witnesses which are subject to this motion to compel dealt with the issue of the implicit settlement of the lawsuit by the State. Reilly contends that the deponents should be compelled to answer these questions regardless of Judge Magnuson's summary judgment order on this issue.

An order granting summary judgment is an interlocutory order. Golman v. Tesoro Drilling Corp., 700 F.2d 249, 253 (5th Cir. 1983). The decision of the Court granting the State's motion for partial summary is a decision that the Court may reconsider. A trial court is not inexorably bound to the precedent it establishes in the course of a trial. Rule 54(b) of the Federal Rules of Civil Procedure expressly provides that all trial orders are subject to revision at any time before the entry of final judgment. Id. at 253.

The Eighth Circuit Court of Appeals' denial of Reilly's Petition for Writ of Mandamus directing Judge Magnuson to vacate his orders for summary judgment and reconsideration does not affect the interlocutory nature of Judge Magnuson's rulings. The Order denying the petition was not an adjudication on the merits. The Eighth Circuit denied Reilly's petition because the Court was convinced that Reilly's interests would be adequately protected by its right to appeal. See Order of United States Court of Appeals, A-25. Refusal by the Court to exercise its original jurisdiction is not an adjudication on the merits, and, therefore, does not have preclusive effect. Key v. Wise, 629 F.2d 1049, 1055 (5th Cir. 1980), cert. denied, 454 U.S. 1103 (1981); Miofsky v. Superior Court of State of California, 703 F.2d 332, 336 (9th Cir. 1983); Jarvis v. Brown, 347 F. Supp. 1214, 1217 (C.D. Cal. 1972).

Reilly contends that if discovery is not presently allowed on the issue of the implied settlement of the lawsuit, it will be unable to avoid the law of the case on this issue. The doctrine of the law of the case is an amorphous concept. It provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. Arizona v. California, ___ U.S. ___, 103 S. Ct. 1382 (1983); In re Multi-Piece Rim Products Liability Litigation, 653 F.2d 671, 678 (D.C. Cir. 1981). However, the law of the case doctrine is not inflexible, and does not preclude a trial judge from reconsidering issues that have been previously decided if such a course is warranted by considerations of substantial justice. United States v. Imperial Irrigation District, 559 F.2d 509, 520 (9th Cir. 1977), modified

on other grounds, 447 U.S. 352 (1980); United States v. Horton, 622 F.2d 144, 149 (5th Cir. 1980); Wm. G. Roe & Company v. Armour & Company, 414 F.2d 862 (5th Cir. 1969).

A court has the power and responsibility to depart from a prior holding if there is newly discovered evidence, if the controlling authority has since made a contrary decision of the law applicable to the issues, or if the decision was clearly erroneous and would work a manifest injustice. Arizona v. California, ____ U.S. ____, 103 S. Ct. 1382, 1391 (1983); Loumar, Inc. v. Smith, 698 F.2d 759, 762 (5th Cir. 1983); In re Multi-Piece Rim Products Liability Litigation, 653 F.2d 671, 678 (D.C. Cir. 1981); Morrow v. Dillard, 580 F.2d 1284, 1292 (5th Cir. 1978); White v. Murtha, 377 F.2d 428, 432 (1967). Reilly believes that the granting of summary judgment before a ruling was made on Reilly's motion to compel deposition testimony was erroneous and manifestly unjust and is certain to be reversed on the ultimate appeal of this case. That action guaranteed that the Court would not have a complete record before it at the time it ruled on the summary judgment motion. The Court was apparently willing to proceed on the summary judgment motion because of Reilly's inability to come forward with an affidavit from one of its own representatives showing that the State had settled with Reilly. However, as the present motion to compel indicates, Reilly has been precluded from obtaining evidence concerning indirect communications concerning settlement made by the State to the City. Moreover, Reilly will shortly move for reconsideration of that ruling because of the failure of the State of Minnesota to produce a number of documents including tapes of

PCA Board Meetings until recent months, after leading Judge Magnuson into error.

If discovery is not allowed at the present time, Reilly would be forced, after appeal, to resume the discovery which was denied. This would not serve the principal of judicial economy. Further, by denying discovery until many years from now there may be additional witnesses that may be dead, incapacitated or unavailable. The Court cannot assume, for example, that Lindall, Van de North, Popham, Macomber or Worden will be available to testify at that time. Therefore, the deponents should be compelled to answer the inquiries concerning the implied settlement defense.

Finally, even if the issue of the State's participation in the settlement were regarded as out of the case, it is clear that the scope of the 1970 lawsuit and the Purchase and Hold Harmless agreements which followed are still very much in the case, both because of Reilly's counterclaim against the City and the City's prayer for a declaratory judgment. Even if we consider that the Court has removed the issue of State settlement, the State should not be allowed to shield its lawyers from testifying concerning matters which are relevant to the dispute between Reilly and the City.

B. Elements Necessary For Assertion Of The Attorney-Client Privilege Are Not Present Here.

The attorney-client privilege may properly be asserted with respect to a confidential communication only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom

the communication was made (a) is a member of the bar of a court, or his subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client, and (b) without the presence of strangers; and (4) the privilege has not been waived by the client. United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950). The burden of proving these necessary elements rests on the one asserting the privilege in an attempt to withhold disclosure. Federal Trade Comm'n v. Shaffner, 626 F.2d 32, 37 (7th Cir. 1980).

As is evident from the above definition, the attorney-client privilege only protects against disclosure of confidential communications; it does not protect disclosure of the underlying facts. Upjohn Co. v. United States, 449 U.S. 383 (1981). "Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories." Hickman v. Taylor, 329 U.S. 495, 508 (1947). Such attorney generated information, if kept confidential, is protected only by the work product doctrine. SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 523 (D. Conn.), appeal dismissed, 534 F.2d 1031 (1976). The work product doctrine is discussed infra at pp. 36-41 et seq.

The arguments of the State and the City on the law of attorney-client privilege misstate the law by oversimplifying it. It is not, for example, true that merely any statement made by a client to an

attorney is privileged, as might at first seem apparent from a reading of Minn. Stat. § 595.02(2) or the arguments of the State and the City. Only those communications both made in confidence and whose subject matter is intended to be and to remain confidential are privileged. That is the law, both generally and in Minnesota. See, e.g., Schwartz v. Wenger, 267 Minn. 40, 42, 124 N.W.2d 489, 491 (1963) ("Our statute governing the attorney-client privilege [citing to Minn. St. § 595.02(2)] has been construed to limit its application to confidential communications."); United States v. Tellier, 255 F.2d 441, 447 (2d Cir.), cert. denied, 358 U.S. 821 (1958) ("It is of the essence of the attorney-client privilege that it is limited to those communications which are intended to be confidential . . .. Thus, it is well established that communications between an attorney and his client, though made privately, are not privileged if it was understood that the information communicated in the conversation was to be conveyed to others."). "Moreover, where, as here, information is given and it is agreed that it is agreed that it is to be transmitted to a third party, then not only the specific information, but the more detailed circumstances relating to it are subject to disclosure." Id. at 448. Cf. Wenner v. Gulf Oil Corp., 264 N.W.2d 374, 378 (Minn. 1978) ("'Wherever the matters communicated to the attorney are intended by the client to be made public or revealed to third persons, obviously the element of confidentiality is wanting', and the attorney-client privilege will not protect the statement."). Thus, for example, communications made by the City or the MPCA to Worden or Lindall staking out a position to be taken in negotiations over the Purchase

Agreement or some other aspect of settlement are not privileged, inasmuch as there is no intention that the subject matter of such a communication remain confidential.

Furthermore, a communication from attorney to client be made in confidence and be intended to be, and to remain, confidential; it enjoys the attorney-client privilege as such "only if the communications reveal the substance of the client's own statements". United States v. Bonnell, 483 F. Supp. 1070, 1077 (D. Minn. 1979). See also SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 522 (D. Conn. 1976), appeal dismissed, 534 F.2d 1031 (1976); McCormick, Evidence § 91, pp. 187-8 (2d ed. 1972). "To extend the privilege to matters of which the attorney has gained knowledge from sources other than the client would carry the obstructive effect of the privilege far beyond any justification in present-day policy . . .." United States v. Bonnell, 483 F. Supp. at 1077.

Under the above-stated rules concerning the attorney-client privilege, the information which Reilly seeks from the deponents is not protected by the attorney-client privilege.

Plaintiffs apparently claim that their correspondence or communications between one another is privileged under the joint defense privilege under which co-defendants and their attorneys may cooperate without waiving the attorney-client privilege. See, Matter of Grand Jury Subpoena, 406 F. Supp. 381 (S.D.N.Y. 1975). However, that privilege, if it can exist at all among co-plaintiffs, (see Note, Waiver of Attorney-Client Privilege on Inter-Attorney Exchange of Information, 63 Yale L.J. 1030, 1032-1033 (1954) (no precedent for co-plaintiff

privilege)) certainly cannot be asserted by the plaintiffs following the signing of the hold harmless agreement. "Where parties ... have engaged in a joint enterprise for defense against litigation, they have no legitimate expectation that the attorney-client privilege will prevent use of joint defense material if one of the parties later becomes an adverse litigant." Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 90 F.R.D. 45, 48 (N.D. Ill. 1981). Hence, at least when the City agreed to hold Reilly harmless with respect to claims pertaining to water pollution, the City's interests became adverse to those of the State and any privilege which might have existed was destroyed.

More importantly, communications between co-counsel do not have any privilege of their own. The co-counsel rule is one which merely prevents a waiver when one counsel passes to co-counsel information which is otherwise privileged. Note, 63 Yale L.J. 1030, supra. Non-privileged material does not become privileged merely because it is contained in a statement made by one lawyer to another on the same side of a lawsuit. Nor is the lawyer's communication itself privileged unless it relates to an attorney-client confidence. See Note, Attorney-Client Privilege as Affected by Communications Between Several Attorneys, 9 ALR 3d 1420, 1422-23.

C. Elements Necessary For Assertion Of The Work Product Doctrine Are Not Present Here.

The words "work product" are among the most misunderstood and misapplied words in the legal vocabulary. In this case, for example, Reilly's main purpose in questioning the lawyers who negotiated the

settlement and drafted the documents is to ascertain the scope and intended effect of the settlement. Although this inquiry will necessarily probe the mental impressions held by lawyers in 1970-73, it does not violate the principles which protect lawyers "work product" or, more accurately, trial preparation materials.

A lawyer's file receives limited protection from discovery because "[d]iscovery was hardly intended to enable a learned profession to perform its function either without wits or on wits borrowed from the adversary." Hickman v. Taylor, 329 U.S. at 516, (Jackson, concurring). The unfairness is evident when one adversary attempts to discover the trial strategies, legal opinions or theories of the other, which gives rise to the limited protection given to trial preparation materials. This is also demonstrated by the notes of the Advisory Committee to the 1970 Amendments to Rule 26(b)(3):

> On the other hand, the requirement of a special showing for discovery of trial preparation materials reflects the view that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side. See Field and McKusick, Maine Civil Practice 264 (1959).

Thus, were we trying to question the lawyers for one of our adversaries concerning their current trial strategies, or obtain from their files materials compiled or prepared for trial in this case, we would be seeking trial preparation materials and then would be required to show the "good cause" required by Fed. R. Civ. P. 26(b) and case law.

However, a lawyer's mental impressions, conclusions, etc. are not in themselves "work product" which require a special showing.

Peterson v. United States, 52 F.R.D. 317, 321 (S.D. Ill. 1971) ("the language of rule 26(b)(3) clearly shows that protection afforded to mental impressions, conclusions, opinions or legal theories is limited to documents that are trial preparation materials"); Abel Investment Co. v. United States, 53 F.R.D. 485 (D. Neb. 1971)(taxpayer could obtain a copy of revenue agent's report, plus schedules and worksheets because, the mere presence of mental impressions, conclusions and legal theories within the documents is not conclusive.). See also GAF Corp. v. Eastman Kodak Co., 85 F.R.D. 46, 50 (S.D.N.Y. 1979).

Even so-called "opinion" work product, including an attorney's personal recollections, notes, and memoranda, may be discovered where considerations of public policy and a proper administration of justice militate against nondiscovery of an attorney's mental impressions. In re Murphy, 560 F.2d 326, 336 (8th Cir. 1977). In this regard, the type of proceeding in which discovery is sought and the nature and necessity for the desired materials are relevant considerations. Id. at 336 n. 19.

In this case, Reilly is not trying to obtain the trial strategies, legal opinions or theories of its adversaries. Rather, it is trying to ascertain the details of the settlement of a lawsuit in 1972 and 1973, and the meaning of certain agreements entered into in those years. The parties who negotiated the disposition of the case and the agreements happen to be lawyers. We want their intent, an intent that might have been held by a non-lawyer, had the negotiator been a lawyer.

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As with the attorney-client privilege, the party seeking the protection of the doctrine must show that he meets the requirements thereof, including the implicit requirement of confidentiality. Securities and Exchange Comm'n v. Gulf & Western Industries, Inc., 518 F. Supp. 675, 682 (D.D.C. 1981). Moreover, even proper assertion of the doctrine does not automatically prevent disclosure.

The Murphy test for obtaining "opinion" work product has been satisifed in at least one case in the Eighth Circuit. In American Standard, Inc. v. Bendix Corp., 80 F.R.D. 706 (W.D. Mo. 1978), the plaintiffs sued for fraud. When the defendant invoked the statute of limitations, the plaintiff claimed that its attorneys had only discovered the fraud within the statute of limitations. The defendant then deposed plaintiffs' attorneys on that subject. The court held that, while the discovery sought was opinion work product, the circumstances were such to justify discovery of the attorneys knowledge. To deny the defendant the opportunity to depose plaintiffs' attorneys would have been to deny the defendant the ability to prove its statute of limitations defense. The court held further that, since fraud is a mixed question of law and fact, discovery could not be limited to purely factual matters and could delve into opinions as well. The court concluded that the Code of Professional Responsibility did not bar an attorney from testifying when his opinions were prime evidence on a critical issue. Id. at 710.

A similar result was reached in Bird v. Penn Central Co., 61 F.R.D. 43 (E.D. Pa. 1973). Defendant raised the defense of laches to plaintiffs' claim for rescission. Since plaintiffs had relied on their

attorney's opinion, the point in time when the attorney knew there were grounds for rescission became a central issue in the case. Discovery of opinion work product relating to that point was held to be proper. Id. at 46-47.

In evaluating the Rule 26(b)(3) test of when material otherwise covered by the work product doctrine is discoverable, the court in Donovan v. Fitzsimmons, 90 F.R.D. 583 (N.D. Ill. 1981), ruled that material that was presumptively subject to the work product doctrine had to be produced during discovery where that material dealt with a "critical area of inquiry in the case." The court relied upon 4 Moore's Federal Practice, § 26.64[4] (2nd Edition 1974), for the proposition that while Rule 26(b)(3) provides protection for work product, "such protection would not screen information directly at issue." Id. The analysis of Fitzsimmons is applicable to the present case. Just as crucial issues in Fitzsimmons turned on the content of attorneys' statements to the defendants, so do the crucial issues in the present case turn on the question of what the attorneys intended to accomplish during the settlement negotiations.

In another case in which the court was faced with the question of Rule 26(b)(3), the court in Truck Ins. Exchange v. St. Paul Fire & Marine Ins. Co., 66 F.R.D. 129 (E.D. Pa. 1975), held that an attorney's files in an underlying case were discoverable. In that case, the insurer of a defendant in an underlying case brought an action against another insurer in an attempt to seek contribution for the amounts spent in the underlying case. The defendant requested discovery of the attorney's

files in the underlying case for purposes of determining whether it was liable as an insurer and whether the attorney's settlement in the underlying case had been reasonable. It also sought to depose the attorney. Once the defendant insurer had demonstrated that need for the information, the court had no difficulty in determining that the defendant had met the test of Rule 26(b)(3). The court noted that the materials in the file and the activities of counsel would be determinative of several important issues in the case. Like the court in Fitzsimmons, the court in Truck Ins. concluded its discussion by citing Professor Moore and by holding that, since the activities of the attorney in the underlying lawsuit were the basis of the insurer's defense in the case at bar, the files relating to those activities would be discoverable and the attorney would be compelled to answer questions at a deposition. 66 F.R.D. at 136.

Since the deponents were acting as negotiators and advisers to the City and the PCA during the settlement negotiations, the only way to find out what they intended to do, and what they considered the effects of the Purchase Agreement and hold harmless agreement to be, is to ask them. Reilly has no other way of obtaining this information. Thus under the holdings of the cases cited, Reilly has met the test of need for the information. See, In re Int'l Systems & Controls Corp. Securities Litigation, etc., 693 F.2d 1235, 1240-41 (5th Cir. 1982).

D. The City and State Placed In Issue The Scope of The 1970 Lawsuit And The Intent Of The Parties In Entering Into The Agreement For Purchase Of Real Estate And The Hold Harmless Agreement Thereby Waiving The Privilege.

Even assuming, arguendo, that the attorney-client or work product privileges invoked by the State and the City were generally applicable here, there is still no valid basis for their assertion under the facts of this case. The City, in its cross-claim against the State has put into issue the question of what communications, representations and understandings existed between it and the State with respect to the Purchase Agreement, hold harmless agreement and the settlement of the lawsuit. The City has also sought a declaratory judgment from this Court alleging that the agreement was never intended by either the City or the State to cover groundwater contamination.

The State, apparently concerned that it too, may be held to have acquiesced in the settlement, has supported the City's position. See Affidavits of Sandra S. Gardebring and Dale L. Wikre, A-26, 27. It is clear from the evidence already obtained through discovery that the State and the City were at each others throats concerning the clean up of the site from 1973 through 1977. Then, in 1978, they forged an unholy alliance against Reilly, claiming that they were "amending" the 1970 complaint to include groundwater even though virtually all of the discussions between the parties in the early 1970's did include groundwater. Thus, the State and the City are at present clearly joint venturers in their attempt to prove to this Court that the 1972 and 1973 agreements did not involve groundwater.

When a party affirmatively places in issue privileged communications and information, making it relevant to the case, the party making such an assertion is deemed to have waived the privilege. Pitney-Bowes, Inc. v. Mestre, 86 F.R.D. 444 (S.D. Fla. 1980); Haymes v. Smith, 73 F.R.D. 572 (W.D.N.Y. 1976); Connell v. Bernstein-McCaulay, Inc., 407 F. Supp. 420 (S.D.N.Y. 1976); Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975).

The rationale underlying the doctrine of waiver by issue injection was perhaps best explained by the United States District Court for the Eastern District of Washington in Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975). In that case, a civil rights plaintiff sought to discover legal advice that had been given to the defendants pertaining to the subject matter of the alleged civil rights violation. The defendants claimed that the information was protected by the attorney-client privilege. The court rejected the defendant's argument and ruled that the defendants had waived the privilege by asserting a qualified immunity defense to the civil rights claim. The court explained its holding as follows:

> All of these established exceptions to the rules of privilege have a common denominator; in each instance, the party asserting the privilege placed information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would have been manifestly unfair to the opposing party. The factors common to each exception may be summarized as follows: (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense. Thus, where these

three conditions exist, a court should find that the party asserting a privilege has impliedly waived it through his own affirmative conduct.

Id. at 581. The application of the doctrine of waiver by issue injection is particularly compelling in this case. The actions of the City and the State clearly fall within these guidelines set forth in Hearn. They allege that the Purchase Agreement, the hold harmless agreement and the settlement of the lawsuit were never intended by either the City nor the State (with whom the City agrees it consulted) to cover groundwater contamination. The City has sought a declaratory judgment from the Court so construing the agreements. Yet, the City and State contend that the information relating to the circumstances surrounding the scope of the lawsuit, the settlement or the considerations upon which the settlement was based are privileged and are not discoverable, thereby denying Reilly access to information which is vital to the preparation of its defense. When parties voluntarily inject into a suit their state of mind, they waive the protection of the attorney-client privilege. Sedco International v. Cory, 683 F.2d 1201 (8th Cir. 1982), cert. denied, ___ U.S. ___, 103 S. Ct. 379 (1982). United States v. Exxon Corporation, 94 F.R.D. 246 (D.C. Cir. 1981).

E. The Voluntary Production Or Disclosure Of Privileged Communications By Saint Louis Park And The State Of Minnesota Constitutes A Waiver Of The Privilege.

Both the State and City have voluntarily disclosed to Reilly a myriad of documents involving the various matters about which claims of privilege have been asserted, thereby waiving those privileges, and

questions pertaining to those matters may not now be blocked by privilege claims.

In a federal question case, evidentiary privileges are "governed by the principles of the common laws as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. While state law privileges may be considered, resolution of the issue is ultimately a decision of federal law. Lewis v. United States, 517 F.2d 236, 237 (9th Cir. 1975); See, In re Grand Jury Proceedings, 517 F.2d 666, 669-70 (5th Cir. 1975).

Considerable diversity outlines the path taken by the courts in determining when an otherwise privileged communication loses its privilege. In some cases, the failure to maintain confidence itself is held to constitute a waiver of the privilege. United States v. Aronoff, 466 F. Supp. 855 (S.D.N.Y. 1979); In re Horowitz, supra. Other cases suggest that waiver must be intentional and disclosure voluntary before the privilege ceases. See, Connecticut Mutual Life Ins. Co. v. Shields, 18 F.R.D. 448 (S.D.N.Y. 1955). The vast majority of cases suggest that waiver may be made by implication. Champion International Corp. v. International Paper Co., 486 F. Supp. 1328 (N.D. Ga. 1980); In re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982), Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1974); In re Grand Jury Investigation of Ocean Transportation, 604 F.2d 672 (D.C. Cir. 1979) cert. denied subnom., Sea Land Services, Inc. v. United States 444 U.S. 915 (1980). Tasby v. United States, 504 F.2d 332 (8th Cir. 1974), cert. denied, 419 U.S. 1125 (1975). In fact, proposed Federal Rule of Evidence 511, which was prescribed and approved by the United States Supreme Court, states that a privilege is waived if the "holder of the privilege voluntarily discloses

or consents to disclosure of any significant part of the matter or communication." While Congress decided to adopt a more general rule (FRE 501), proposed Rule 511 is an important guideline to the federal law of privilege. United States v. Mackey, 405 F. Supp. 854, 858 (E.D.N.Y. 1975).

Accordingly, it is now widely held that the voluntary disclosure of privileged communications constitutes a waiver of that communication. See, e.g., United States v. Cote, 456 F.2d 142 (8th Cir. 1972); Duplan v. Deering Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1974); W. R. Grace & Co. v. Pullman, Inc., 446 F. Supp. 771 (W.D. Okla. 1976). In re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982).

In the analogous area of the work product doctrine, recent decisions have also indicated that work product protection is waived by disclosure of protected information in circumstances in which the attorney or client cannot reasonably expect to limit future use of the communication. In re Doe, 662 F.2d 1073, 1081 (4th Cir.) cert. denied, 455 U.S. 100 (1982). Disclosure which occurs in a "free and voluntary" manner to someone with adverse interests must discharge the privilege.

> . . . A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.

Gorzegno v. Maguire, 62 F.R.D. 617, 622 (S.D.N.Y. 1973) (quoting 8 Wigmore, supra, § 2327, at 636).

The Pullman case, cited above, is illustrative. There, defendant Pullman voluntarily produced documents almost four months after a Request for Production was served. Notwithstanding the apparently voluminous amount of discovery involved, the court stated that the defendant could have taken the necessary steps to remove purportedly privileged documents prior to permitting discovery. The court reiterated, "One cannot produce documents and later assert a privilege which ceases to exist because of the production." 446 F. Supp. at 775.

In the instant case, Saint Louis Park and the State of Minnesota have produced to Reilly a number of documents. Reilly requested production of documents in April, 1979. In May of that year, the City and the State responded to the request with specific objections. Both parties asserted objections to the production of privileged communications. See state court pleadings, Responses to Defendant's Request for Production of Documents - May 21, 1979, A-30, 31, made a part of this action by Stipulated Order dated June 24, 1983. Then, in late June and over the remainder of 1979, document production took place. The major production took place during the summer almost four months after the initial Request for Production. The State produced approximately ten thousand pages in August and the City produced perhaps half that number shortly thereafter.

The State and City thus had an extended period to review documents before production. Indeed, the documents were in fact reviewed for privileged matter before production. See Lindall Deposition at 103:4-11. Accordingly, the production of those documents by the City and

State constitutes a waiver of any privilege which may otherwise have attached as to them.

Despite the facts surrounding their production, the State and City have taken the position that as to certain documents no waiver by production may be implied and hence objections may yet be asserted because the production of the documents was somehow "inadvertent". See, e.g., Lindall deposition at 125:8-25. As will be seen, however, this claim of inadventence does not help the City and State here and at any rate is specious at best.12/

It is generally recognized that once a confidentiality has been disclosed, however inadvertent, any previously existing privilege is destroyed and cannot be subsequently asserted. First Wisconsin Mortgage Trust v. First Wisconsin Corp., 86 F.R.D. 160, 173 (E.D. Wisc. 1980) ("inadvertent" waiver may even extend to documents not produced which relate to same subject matter as documents for which privilege was waived). See also, In re Grand Jury Investigation of Ocean Transportation, 604 F.2d 672 (D.C. Cir.), cert. denied sub nom, Sealand Services v. United States, 444 U.S. 915 (1979); Duplan Corp. v. Deering

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12/ The State in its brief in response to this motion to compel cites to the unpublished order of Judge Larson in Overhead Door Corp. v. Nordpal Corp., No. 4-75-Civ. 523 (D. Minn. 1978). However, this case adds nothing to the discussion. Indeed Judge Larson confirms that the rule to be derived from International Business Machines v. United States, 471 F.2d 507 (2d Cir. 1972) cert. denied 416 U.S. 979 (1974), is that, before an inadvertence argument may even appropriately be considered in the context of document production, the production must have been one forced by an accelerated schedule set by the court. No accelerated discovery was required of anyone here. Both the City and State were given several times the length of time that the rule allows.

Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1974); United States v. Kelsey - Hayes Wheel Co., 15 F.R.D. 461, 464 (E.D. Mich. 1954). No exception to the rule is applicable here, as is apparent when the instant case is compared with Control Data Corp. v. IBM Corp., 16 Fed. R. Serv. 2d 1233 (D. Minn. 1972), where an exception to the rule was made.

In Control Data Corp. v. IBM Corp., supra, 80 million CDC and 17 million IBM documents were produced. The Minnesota Federal District Court ruled that the privilege was not waived for these documents, but only because the massive document discovery occurred under a court-ordered, accelerated schedule. 16 Fed. R. Serv. 2d at 1234, 1235. The Control Data - IBM exception was further explained in Transamerica Computer Co. v. IBM Corp., 573 F.2d 646 (9th Cir. 1978). There, the Ninth Circuit observed that the production of privileged documents had been "compelled" by the rigorous and accelerated discovery schedule imposed by the Minnesota district court. 573 F.2d at 651. The court held that, "IBM's inadvertent production... of some privileged documents does not constitute a waiver... for that production was 'made without [adequate] opportunity to claim the privilege.'" Id.

The Transamerica court indicated that the IBM discovery proceeding was "truly exceptional" and "unique," implying that only when discovery is massive, accelerated and "compelled" should inadvertant production reverse the implied waiver doctrine which is applicable to freely and voluntarily disclosed communications. Id.

In the instant case, the actions of Saint Louis Park and the State do not measure up to the standards enunciated by Judge Neville in

Control Data Corp. v. IBM Corp, supra. In fact, the parties took over four months to produce something less than twenty thousand pages. This volume of documents produced is minute relative to the mammoth discovery in Control Data. Moreover, at no time were Saint Louis Park or the State compelled or forced to accelerate the initial production requests. In addition, on many occasions, the disclosed communications now in question were produced not once, but several times under independent circumstances. For example, in the deposition of Lindall, the State objected to questions concerning RTC ex. 22, 23, and 27, among others, on the ground that those documents were privileged and any production was inadvertent. See Lindall Deposition at 109:17 - 110:13, 110:15 - 111:3, 125:8 - 25. These documents, however, were independently produced two, five and three times, respectively. This is evidenced by the document numbers appearing on RTC Ex. 22, 23, and 27, which were explained at the same deposition by counsel for Reilly. See Lindall Deposition at 137:6 - 138:5. Multiple productions of documents, reviewed before production for privilege (see Lindall Deposition at 103:4 - 11), hardly support a claim of "inadvertence".

There is a glaring example which exposes the intentional and voluntary production and hence waiver of privileged communications. On October 31, 1979, Wayne Popham, representing Saint Louis Park, met with Edward Schwartzbauer, counsel for Reilly. Their discussion took place in the Dorsey law offices and related to Popham's memorandum summarizing the events leading to the City settlement with Republic Creosote. (RTC Ex. 85, A-3). Popham displayed no concern for the work product privilege.

Further, later correspondence between Popham and Schwartzbauer indicates a continued willingness to develop and expose the subject matter detailed within the memorandum. RTC Ex. 86, 87, A-28, 24; see Edward J. Schwartzbauer Affidavit and exhibits attached (A-29) and Popham Deposition at 40 et seq.).

The discussion of the Popham memorandum in the City's brief is nothing short of incredible. The City now states that, had Reilly asked for it formally, Reilly would have been given the same information as delivered by Popham through his disclosure of the memorandum to Kaul and documents referred to therein. See Br. of City at 28. Presumably, this means they now waive their objections, asserted at Popham's deposition, that this memorandum and its contents were privileged. (Cf. Dep. of Popham at 40). The Popham memorandum, however, both in general and in particular, reveals information which both the City and the State otherwise claim is privileged. For example, the memorandum makes the assertion that in July of 1971, counsel for the City and the PCA discussed the case and "agreed that the pollution problems were being solved by the closing of the plant.". RTC Ex. 85, p. 6, A-3. Whether or not this version is accurate, it does purport to reveal the substance of a discussion between counsel during a period of alleged joint interest. Reilly should be permitted to inquire as to that discussion and to test the assertions in the Popham memorandum and the understandings at the time.

Similarly, the memorandum asserts that "[a]s part of its negotiating strategy, the City attempted to stress every possible

negative about the value of the property. This included expressing concern about soil conditions." (Id.) Again, whether or not accurate, this purports to reveal confidential "negotiating strategy".

The memorandum contains several other revelations of confidences, strategy, work product, and the like, including:

- The assertion that after Reilly indicated it was closing down its operations, "the City and the PCA discontinued preparation of proof in the lawsuit." (Id. at p. 7).

- A statement by the PCA to the City in December of 1971 that the "saturated ground" at the Reilly site "is a potential source of ground water and surface water pollution; however, to require the company to remove all ground is unrealistic." (Id. at p. 8).

- Assertions as to why the City did not, as part of the settlement, seek damages from Reilly as a property owner. (Id.).

- Assertions as to what advice was given the City by the PCA, and as to why the City agreed to take the property "as is". (Id. at p. 9).

- Assertions that, after the purchase agreement was signed with both an "as is" provision covering "any and all questions of soil and water impurities and soil conditions" and a statement that the purchase agreement was understood as a means of settling the issues in the lawsuit (thereby confirming that "any and all questions of soil and water impurities" were at issue in the suit), "both the City and the PCA expected to dismiss the suit at the time of the closing." (Id. at pp. 9-10).

- Assertions as to the details of discussions in June, 1973 between the City and the State concerning events surrounding the hold - harmless agreement, including the assertions that "[w]hen the PCA was contacted to obtain the dismissal of the action that was required by the settlement, the staff responded with an indication that it was not prepared at that time to provide a dismissal, because the details had not been worked out on the cleanup to be done by the City on the property," where "the PCA indicated that since the settlement" certain meetings between the City and the State had not taken place, and that "Republic Creosote wanted a hold - harmless from the City in lieu of a dismissal by the PCA. This fact was discussed with the PCA." (Id. at pp. 10-11) (emphasis added).

The language chosen by Popham speaks of the settlement as past tense even before the hold harmless was signed. Clearly, Reilly has a right to depose him concerning the facts that justified that choice of language.

Moreover, in the correspondence following the voluntary disclosure of the memorandum and its contents to counsel for Reilly by counsel for the City, counsel for Reilly explicitly reminded Popham that "PCA involvement in the settlement is an issue." RTC Ex. 86, A-28; see also Affidavit of Edward J. Schwartzbauer, A-29. Mr. Popham answered several questions regarding the memorandum (see RTC Ex. 87, A-24; see also Affidavit of Edward J. Schwartzbauer, A-29), specifically acknowledged that the June 14, 1973 meeting, several details of which are referred to in the memorandum, was between Rolfe Worden, counsel for the City, and Jack Van de North, counsel for the State, and further stated that the people who would have knowledge regarding proof of the fact that as of April 14, 1972, the PCA expected to dismiss the suit included, inter alia, Eldon Kaul, Robert Lindall and Jack Van de North (all lawyers for the State), and that the people who were actually involved in the June 1973 discussions between the City and the State referred to in the memorandum were, for the City, "at least in part", Rolfe Worden (attorney for the City), and for the PCA, Jack Van de North and Eldon Kaul. (RTC Ex. 87, A-24).

Given the contents of the memorandum from Popham to Kaul, the context in which it was disclosed to counsel for Reilly, and, indeed, the

arguments now advanced by the City, the current claims of attorney-client privilege and work product are nothing more than a sham.[13/]

The Saint Louis Park and State claims of inadvertent production are spurious in light of the facts of this case. It would be manifestly unfair and unrealistic to permit the asserted privilege as to those communications and subject matters which have been examined and used over the past several years. These matters have been injected as issues in the case and the parties cannot now be heard to assert presumed privileges which have in any case been waived.

Courts are particularly skeptical of permitting the assertion of the attorney-client privilege by a party when that party seeks to introduce some otherwise protected material in its own behalf. In Computer Network Corp. v. Spohler, 95 F.R.D. 500 (D.D.C. 1982), an attorney-officer of a corporate party to the lawsuit had submitted a factual affidavit to the court in support of a motion. The affidavit spoke to the merits of an issue in the case, and the opposing party sought later to depose him concerning the factual basis of the assertions in the affidavit. When objections based on privilege were raised, the party seeking discovery moved for an order to compel answers. The court granted the motion, observing:

13/ Note also in this regard the statement in Appendix F of the City's Brief that it is now prepared to allow Mr. Popham to testify as to when he first became aware of the City's concern for well contamination. The City thus recognizes that the date at which its lawyer first became aware of a relevant fact is not itself a privileged fact. Despite this, however, it continues to refuse to respond to similar inquiries concerning whether or not one of its lawyers was aware of a certain fact by a given date. (See, e.g., Appendix A-D to Brief for City).

> [E]ven if the communications came within the attorney-client privilege, this Magistrate concludes that the privilege was waived. A party cannot voluntarily disclose facts in his favor before a judicial tribunal, when they are helpful to his cause, and then invoke the attorney-client privilege as a shield to prevent a searching inquiry so that a court may determine the truthfulness of the facts initially presented. A litigant cannot convert the privilege into a tool for selective disclosure. The Permian Corporation, et al. v. United States, 665 F.2d 1214 (D.C. Cir. 1981). Accordingly, Mr. Schott at a continuation of his deposition shall be required to answer questions concerning the factual basis for the factual representations in the affidavit executed by him and submitted to the Court...

95 F.R.D. at 502-503. See also, Garfinkle v. Arcata Nat'l Corp., 64 F.R.D. 688 (S.D.N.Y. 1974). Where an affidavit of an attorney is submitted to the court on behalf of his client, which affidavit purports to be based on information received by him as an attorney for his client, as Lindall did explicitly in his 1978 affidavit, and as he and Van de North implicitly have in their 1983 affidavits, any existing attorney-client privilege is waived. See Trans World Airlines, Inc. v. Hughes, 332 F.2d 602, 615 (2d Cir. 1964), cert. dismissed, 380 U.S. 248 (1965); Gorzegno v. Maguire, 62 F.R.D. 617, 622 (S.D.N.Y. 1973).

The weakness of the State's position is apparent in its response to its use of affidavits by Lindall and Van de North. Its attempted distinction of Computer Network Corp. v. Spohler, 95 F.R.D. 500 (D.D.C. 1982), that the affidavit there was used "affirmatively", is no distinction at all, and certainly not one that makes any relevant difference. The State certainly used the factually conclusory affidavits of Lindall and Van de North affirmatively in support of its motion for summary judgment. It certainly used the 1978 Lindall affidavit

affirmatively to get its complaint amended in the State Court action. And even if these were used solely to "defend" on an issue raised by another party, the point is that they were in fact used at all. They represent a conscious decision thrice made on the part of the State to utilize its former lawyers to testify as to facts such as settlement vel non in a conclusory fashion, rather than have someone else do it. The State's own repeated use of lawyer testimony makes its complaints against Reilly's desire to ascertain the facts behind that testimony ring hollow.

Nor are these lawyer affidavits the only example of an inconsistent assertion of the privileges claimed. In the deposition of Worden, to cite another example, although counsel for the State and the City had otherwise generally objected to use of exhibits reflecting communications between counsel for the State and for the City, no objection was voiced by either of them to inclusion in the record or questions concerning RTC ex. 63 and 64, letters between Worden and Eldon Kaul, the Special Assistant Attorney General who succeeded Van de North,[14/] concerning conditions acceptable to the PCA for a formal dismissal of the litigation. See Worden Deposition at 27:3 - 29:10, 30:3-12, 31:6 - 17.

The principles of exception and implied waiver apply to the work product doctrine as well. See, e.g., In re John Doe Corp, 675 F.2d 482 (2d Cir. 1982); United States v. Nobles, 422 U.S. 225 (1975); Appeal of

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14/ The Deposition of Eldon Kaul has been noticed by Reilly, but the State has objected to the taking of the deposition, and the parties agreed to postpone the matter pending future developments, including this Court's ruling on the instant motion to compel.

Hughes, 633 F.2d 282 (3d Cir. 1980); cf. United States v. AT & T Co., 642 F.2d 1285, (D.C. Cir. 1980). (A party waives its work product protection in civil litigation if it discloses the privileged material to anyone without "common interest in developing legal theories and analyses of documents ***.") The court in In re Sealed Case, 676 F.2d 793, 818 (D.C. Cir. 1982) states:

> A simple principle unites the various applications of the implied waiver doctrine. . . . [t]he purpose of the attorney-client privilege is to protect the confidentiality of attorney-client communications in order to foster candor . . .. Disclosure is inconsistent with confidentiality, and courts need not permit hide-and-seek manipulation of confidences in order to foster candor.
>
> The purposes of the work product privilege are more complex, and they are not inconsistent with selective disclosure -- even in some circumstances to an adversary. Yet at some point acceptable tactics may degenerate [and become] inimical to a healthy adversary system.

As a review of the deposition transcripts will reveal, the questions to which the State and City objected were in large part either questions which directly inquired about the contents of the documents produced by the City and State or questions on the subject matter of those produced documents and disclosed communications. See Appendices A, B, C, D. Having produced those documents to Reilly, neither the State nor the City had any right to object to the inquiries made, and Reilly had every right to make them. The witnesses should not have been instructed not to answer, and they should now be compelled by this Court to do so.

CONCLUSION

For all of the foregoing reasons, the motion of Reilly Tar & Chemical Corporation to compel answers should be granted, and Reilly should be awarded the expenses and attorneys' fees to which it is entitled under Federal Rule of Civil Procedure 37.

Dated: April 20, 1984.

Respectfully submitted,

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APPENDIX A

Citations to Deposition Questions Relating to the Scope of the 1970 Lawsuit and Objections Thereto

Deposition of Lindall

19:4 - 20:16	33:11 - 33:15	40:19 - 41:4	54:17 - 54:20
21:3 - 21:14	34:13 - 34:18	41:6 - 41:15	54:22 - 55:11
22:5 - 22:20	34:20 - 35:5	42:25 - 43:15	59:16 - 59:23
24:23 - 25:7	36:11 - 36:22	43:17 - 44:8	60:22 - 61:21
26:5 - 26:17	37:12 - 37:20	44:10 - 44:15	67:9 - 67:15
26:19 - 27:1	38:5 - 38:12	44:17 - 45:2	67:17 - 67:22
27:3 - 27:8	39:6 - 39:8	48:9 - 48:14	116:1 - 116:10
28:23 - 31:12		54:10 - 54:15	
32:23 - 33:9			

Deposition of Macomber

8:21 - 9:4	10:5 - 10:15
9:5 - 9:12	10:17 - 10:20
9:22 - 10:3	

Deposition of Popham

8:9 - 8:13	20:16 - 20:19
8:16 - 8:21	22:17 - 22:19
8:23 - 9:2	22:21 - 22:25
11:6 - 11:16	69:24 - 70:14

Deposition of Wikre

68:1 - 68:22

133:8 - 133:25

Deposition of Johannes

128:4 - 128:9

170:12 - 171:3

Deposition of Wiik

66:7 - 66:25

Deposition of McPhee

117:11 - 117:21

150:7 - 151:3

150:1 - 150:5

APPENDIX B

Citations to Deposition Questions Relating to the Hold Harmless Agreement and Objections Thereto

Deposition of Worden

20:7 - 20:8

20:10 - 20:12

20:17 - 21:17

21:19 - 21:23

21:25 - 22:7

22:9 - 22:12

22:14 - 22:19

22:21 - 23:6

24:19 - 25:5

25:25 - 26:3

55:25 - 56:1

Deposition of Popham

56:10 - 56:15

Deposition of Wikre

85:3 - 85:7

118:25 - 119:13

120:1 - 121:6

135:23 - 136:13

161:22 - 162:11

APPENDIX C

Citations to Deposition Questions Relating to the Purchase Agreement and Objections Thereto

Deposition of Lindall

140:24 - 141:7	141:18 - 142:10
141:10 - 141:15	142:12 - 142:16

Deposition of Worden

10:24 - 11:1	11:3 - 11:9

Deposition of Popham

22:21 - 22:25	54:2 - 54:8
27:14 - 27:17	54:10 - 54:14
49:23 - 49:25	72:21 - 73:7
50:2 - 50:12	73:9 - 73:15
50:14 - 50:18	74:10 - 74:14
51:17 - 51:21	76:15 - 76:25
	77:2 - 77:9

APPENDIX D

Citations to Deposition Questions Relating to the Settlement and Objections Thereto

Deposition of Lindall

69:24 - 70:5	93:4 - 93:10
71:4 - 72:2	93:14 - 93:17
72:8 - 72:14	95:2 - 98:19
72:16 - 72:23	99:9 - 102:13
72:25 - 73:7	102:15 - 103:3
73:18 - 74:7	103:22 - 104:4
74:9 - 74:22	104:5 - 104:9
74:23 - 75:5	107:3 - 107:12
78:9 - 78:16	107:14 - 107:20
78:18 - 78:23	107:22 - 108:3
78:25 - 79:12	108:4 - 108:12
79:21 - 80:16	108:14 - 108:19
80:18 - 80:22	108:21 - 108:25
80:24 - 81:4	109:17 - 110:13
81:6 - 81:10	110:15 - 111:3
81:12 - 81:23	114:8 - 114:14
83:24 - 84:4	117:6 - 117:15
84:6 - 84:10	117:17 - 118:13
85:14 - 85:21	120:17 - 120:23
85:23 - 85:2	120:25 - 121:9
87:2 - 90:1	121:13 - 121:19
92:11 - 92:25	

Deposition of Lindall (cont'd)

122:3 - 122:8
125:8 - 125:25
127:24 - 128:4
129:22 - 130:6
130:19 - 131:10
131:17 - 131:25
132:3 - 132:8
132:17 - 132:25
135:1 - 135:13
135:15 - 135:20
135:21 - 136:23
138:23 - 139:12
139:14 - 139:21
139:23 - 140:4
140:24 - 141:7
141:10 - 141:16
141:18 - 142:10
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147:3 - 147:9
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Deposition of Van de North

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13:8 - 13:13
14:6 - 14:9
14:16 - 14:20
15:2 - 15:9
15:11 - 15:18
15:20 - 15:25
16:2 - 16:7
16:9 - 16:11
16:20 - 17:6
17:18 - 18:1
18:7 - 18:9
18:25 - 19:4
19:6 - 19:12
19:14 - 20:2
20:4 - 20:7

Deposition of Van de North (cont'd)

20:13 - 20:17
20:19 - 20:25
21:2 - 21:9
22:19 - 22:25
23:1 - 23:17
23:19 - 23:25
24:2 - 24:9
28:24 - 29:8
31:18 - 31:25
33:9 - 34:2
34:23 - 35:6
35:11 - 35:14
35:19 - 35:23
36:8 - 36:11
36:16 - 36:19
36:25 - 37:5
37:7 - 37:11
37:16 - 37:20
38:1 - 38:6
38:12 - 38:16
38:18 - 38:23
39:7 - 39:16
40:17 - 40:25
41:8 - 41:22
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Deposition of Macomber

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13:14 - 13:16
13:21 - 14:4
14:6 - 14:10
15:11 - 15:20
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Deposition of Worden

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14:9 - 14:12	20:17 - 21:17
14:14 - 14:17	21:19 - 21:23
14:22 - 14:24	21:25 - 22:7
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16:19 - 16:24	22:14 - 22:19
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Deposition of Popham

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9:7 - 9:8	74:10 - 74:14
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Deposition of Popham (cont'd)

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Deposition of Wikre

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Citations to Miscellaneous Deposition Questions and Objections Thereto

Deposition of Lindall

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Deposition of Wikre

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